PETITION FOR WRIT OF CERTIORARI

Thomas Alfred Tamblyn, Appellant	In the Supreme Court
versus	of the United States
United States of America, Appellee	of America

To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

Now comes your petitioner, Thomas Alfred Tamblyn, and respectfully shows to the Honorable Supreme Court of the United States that on October 29, 1954, the United States Court of Appeals for the Fifth Circuit affirmed a judgment rendered against petitioner by the United States District Court for the Southern Division of the Northern District of Alabama for alleged failing, neglecting, and refusing to appear and submit to induction for training and service in the armed forces of the United States on the 22nd day of October, 1952; and, petitioner's petition for rehearing filed November 27, 1954, (R. 96), was denied by the said Court of Appeals on December 4, 1954, (R. 103), with stay of mandate of the Court for thirty days from December 10, 1954, (R. 105), to allow petitioner time to apply to the Supreme Court of the United States for writ of certiorari.

Petitioner respectfully avers that said affirmation of the judgment of the United States District Court and the said denial of petitioner's petition for rehearing by the said United States Court of Appeals were erroneous, unauthorized by law, unjust and void.

The sole charge upon which petitioner was indicted, tried, convicted and placed in jail was Count One, (R. 2),

in District Court for not submitting for induction on October 22, 1952, long before any other proceeding against him, and long before he had opportunity to question the draft board's denial of his exemption as a minister of religion which failure to submit was not illegal but was justified and supported by U. S. Supreme Court decision in Gibson vs. United States, 329 U. S. 337-362, which holds that "one need not report at the camp in order to exhaust the administrative process so as to be entitled to question the Draft Board's denial of his claimed exemption from military service in a criminal proceeding."

No other or different charge was ever put against petitioner than that he wilfully failed to report for induction on October 22, 1952. All evidence not germane to this charge was irrelevant to convict and put petitioner in jail. To convict one without a charge violates the Fifth, Sixth and Fourteenth Amendments of the Federal Constitution. There is lack of due process of law, lack of information as to the nature and cause of the accusation and a deprivation of life and liberty without due process of law.

The trial Judge in District Court was called upon to charge the jury on the principles in Gibson-Dodez Cases, 329 U. S. 337 and the Estep Case, 327 U. S. 113, and failed to do so saying "I have charged the jury on what I conceive to be the law." (R. 98).

For brevity and to lessen expense petitioner refers to and adopts his petition for rehearing (R. 96-102). (Ten copies furnished).

While the chief question presented is that petitioner was not required to submit to induction on October 22, 1952, under the decision of this Honorable Supreme Court the case was tried almost solely on the question that he was or was not a Regular Minister of Religion. The Lake-

side Church is the only authority under Heaven that can answer that question. The Church members say he was their minister and it is not the policy of the Government to contradict that claim if reasonable. In this case the church so claims and petitioner was so serving exclusively as minister of religion. Under the Selective Service Act as amended Section 6, (g), and Section 16, (G), (2), petitioner was exempted from induction for training and service in the armed forces of the United States. For brevity and saving of expense petitioner adopts as a further brief his brief printed in United States Court of Appeals ten copies of which are here filed.

Petitioner respectfully avers that the writ should be granted because there are grave constitutional grounds involved. If a citizen can be arrested, convicted and put in jail on any kind of evidence before he is charged with the crime, or on evidence not germane to the indictment our life and liberties are seriously endangered. If the Government is to be the authority to declare who shall and shall not be the pastor of a church our sacred principle of separation of church and state will suffer.

Respectfully we say that the United States Court of Appeals for the Fifth Circuit has decided a federal question which has not been, and should be, settled by this Supreme Court, and has decided a federal question in a way probably in conflict with applicable decisions of this Honorable United States Supreme Court.

Respectfully petitioner says that the United States Court of Appeals was in error prejudicial to the rights of petitioner by refusing to grant and consider letters dated May 19, 1954, and May 27, 1954, which were attached by amendment to appellant's brief to said Court of Appeals,

copies of which are attached hereto and marked Exhibits X and Y. (R. 79-80), (R. 77-78), (92-93).

PREMISES CONSIDERED, Your petitioner respectfully prays that the Honorable Supreme Court of the United States will grant him a writ of certiorari in this cause directed to the United States Court of Appeals for the Fifth Circuit for the removal of that Court's judgment affirming the judgment of the United States District Court for the Southern Division of the Northern District of Alabama and the judgment of the United States Court of Appeals for the Fifth Circuit which denied petitioner's petition for rehearing in this cause to this Honorable United States Supreme Court in order that justice may be done in the premises.

.....

Attorney for Petitioner.

I, H. L. Anderton, Attorney for Appellant do hereby certify that the above petition for Writ of Certiorari is true to the best of my knowledge, information and belief, and that it is filed in good faith and is not filed for delay or for any other ulterior reason or motive.

.....

H. L. ANDERTON.

This is to certify that a copy of the above petition for writ of certiorari to the United States Supreme Court was served upon the Honorable M. L. Gwaltney, Assistant Federal Attorney, on the .. day of December, 1954, at his office in Birmingham, Alabama.

.....

Attorney for Petitioner.

EXHIBIT X

STATE OF ALABAMA

JEFFERSON COUNTY

Before me the undersigned personally appeared Mrs. Robert S. Tamblyn who being duly sworn deposed and said as follows:

I do hereby certify that I am the sister-in-law of Thomas Alfred Tamblyn and his only sister-in-law. Thomas Alfred Tamblyn has only one brother namely Robert S. Tamblyn and I am his wife. My husband was never married before his marriage to me and we are still living together as man and wife.

I do hereby certify that I have never met nor spoken to Mr. Van Jones, a member of Draft Board 70 of Bessemer, Alabama, and aver that I have never said to Mr. Van Jones nor to anyone else that Thomas Alfred Tamblyn said to me that "I would be better off in the armed forces and it is not my desire, but my father's and other members of his church, who are fighting so diligently to have me classified in 4-D." And I aver that Thomas never said those words to me or any other words with that meaning or a similar meaning.

(Signed)- MRS. ROBERT S. TAMBLYN
Mrs. Robert S. Tamblyn

Subscribed and sworn to before me on this the 27th day of May, 1954.

(Signed) MARGARET W. LOGAN
Margaret W. Logan
Notary Public

EXHIBIT Y

May 19, 1954
418 Beacon St.
Boston, Mass.

Judge H. L. Anderton
Attorney-at-law
Frank Nelson Bldg.,
Birmingham, Ala.

Dear Judge Anderton:

It has been brought to my attention that one Van Jones, of "Local SSS Board 70" of Bessemer, Alabama, wrote a letter to one Col. Johnson in which he asserted that I had stated, in a conversation I am supposed to have had with him,—"I would be better off in the Armed forces and it is not my desire, but my Father's and other members of the Church, who are fighting so diligently to have me classified in 4-D."

I most emphatically, and without any qualification or reservation, deny that I ever made any such statement in fact, substantially, or by most remote implication, to Van Jones, of said "Board" or to any one else. And I so wish you to inform the Court on my behalf.

Sincerely yours,
(Signed) THOMAS A. TAMBLYN
Thomas A. Tamblyn

L.S.

Signed and sworn to before me this 19 day of May, 1954.

(Signed) DOROTHY F. MARCO
Dorothy F. Marco
Notary Public

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 14858

THOMAS ALFRED TAMBLYN,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Alabama.

(October 29, 1954.)

Before BORAH, RIVES and TUTTLE, Circuit Judges.

RIVES, Circuit Judge: Appellant was adjudged guilty of willfully failing and refusing to report for induction into the armed forces of the United States in violation of Section 12 of the Selective Service Act of 1948, as amended, Sec. 462 of Title 50, Appendix, United States

Code, and was sentenced to imprisonment for a period of two years. That the defendant did fail and refuse to report for induction was established without dispute, and was admitted by the defendant as a witness for himself. His defense was that as a regular minister of religion he was exempt from training and service, but not from registration under Sections 6(g) and 16(g)(2) and (3) of the Act, Sections 456(g) and 466 (g)(2) and (3) of Title 50, Appendix, United States Code.[1]

It is now settled that one need not report for induction to be entitled to question the draft board's denial of his claimed exemption from military service in a criminal proceeding against him. *Gibson v. United States,* 329 U.S. 338, 350; *Estep v. United States,* 327 U.S. 114, 123.

1 "Section 456. *Deferments and exemptions from training and service.*

* * * * *

"(g) Regular or duly ordained ministers of religion, as defined in this title [sections 451-454 and 455-471 of this Appendix], and students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools, or who are satisfactorily pursuing full-time courses of instruction leading to their entrance into recognized theological or divinity schools in which they have been pre-enrolled, shall be exempt from training and service (but not from registration) under this title [said sections]."

"Section 466. *Definitions.*

* * * * *

"(g) (2) The term 'regular minister of religion' means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

"(3) The term 'regular or duly ordained minister of religion' does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization."

The Selective Service Act gives the draft board power to determine all questions or claims with respect to inclusion for, or exemption or deferment from military training and service, and provides that the decisions of such boards and of the administrative appeal boards, and of the President shall be final.[2]

The Supreme Court has, however, construed the word "final" to permit a very limited scope of judicial review. See *Falbo v. United States,* 320 U.S. 549; *Estep v. United States,* 327 U.S. 114; *Eagles v. United States ex rel Samuels,* 329 U.S. 304; *Gibson v. United States,* 329 U.S. 338; *Cox v. United States,* 332 U.S. 442; *United States v. Nugent,* 346 U.S. 1; *Dickinson v. United States,* 346 U.S. 389. In the last cited case it was said:

> "The task of the courts in cases such as this is to search the record for some affirmative evidence to support the local board's overt or implicit find-

2 "Section 460. *Selective Service System*— * * * *
"(b) (3) * * * * * Such local boards, or separate panels thereof each consisting of three or more members, shall, under rules and regulations prescribed by the President, have the power within the respective jurisdictions of such local boards to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this title [said sections], of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final, except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe. There shall be not less than one appeal board located within the area of each Federal judicial district in the United States and within each Territory and possession of the United States, and such additional separate panels thereof, as may be prescribed by the President. Appeal boards within the Selective Service System shall be composed of civilians who are citizens of the United States and who are not members of the armed forces. The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President. The President, upon appeal or upon his own motion, shall have power to determine all claims or questions with respect to inclusion for, or exemption or deferment from training and service under this title [said sections], and the determination of the President shall be final. * *"

ing that a registrant has not painted a complete or accurate picture of his activities. We have found none here.

> "Local boards are not courts of law and are not bound by traditional rules of evidence; they are given great leeway in hearing and considering a variety of material as evidence. If the facts are disputed the board bears the ultimate responsibility for resolving the conflict—the courts will not interfere. Nor will the courts apply a test of 'substantial evidence.' However, the courts may properly insist that there be some proof that is incompatible with the registrant's proof of exemption." *Dickinson v. United States, supra* at p. 396.

Whether or not there was a basis in fact to support the board's classification is a question for the courts to decide and not a matter to be submitted to the jury. *Cox v. United States,* 332 U.S. 442, 453. If the district court errs in failing to examine the files of the board to determine whether or not there was basis for the classification, that error may be cured in the Court of Appeals by that Court's examination. *Cox v. United States, supra.*

In the present case, the District Court stated: "Let the record show that the Court has been through this Selective Service file and has read the material portions, and considered them." While that Court did not expressly state that it found in the file a basis in fact for the board's classification, we have carefully re-examined the file here and are left in no doubt that there was such basis. The appellant first registered on November 1, 1949, an-

swering questions as follows: "7. Occupation—Musician; 8. Firm or individual by whom employed—Self employed; 9. Nature of business, service rendered, or chief product—Teaching music & tuning instruments." In December, 1950, he claimed exemption stating that he had completed 6 years of elementary school, 2 years of junior high school and 1 year of high school, and had been a "theological student under church direction since I graduated from junior high school." He further claimed that he was then working as "Pastor-Evangelist—Directing Vesper Service and Youth Department," and "(On trial as theological student from August, 1949)." On December 14, 1950, registrant wrote a letter in support of his claim for exemption saying in part:

> "Further (sic), Mrs. D. K. Price, who happens to be a sister-in-law to Mr. Van Jones (who I believe is on the Board) will also be glad to testify and to assert that she has known me from birth and that I have been training for this Gospel Ministry since I left common school and she has taken the Greek work in class, as a matter of fact, with me: as connected with my theological studies."

A later communication from the Local Board to the State Appeal Board recites:

> "On December 19, 1950, Board Member Jones was called by Mrs. D. K. Price by telephone and was informed that Thomas A. Tamblyn was not a pastor of Lakeside Church, but had been called to preach or pastor said church. She further stated that Thomas' religious activities at that time (and is true today) was teaching of a youth

> Sunday School Class on Sunday afternoons. The Board would like to point out at this point that this work now being done by Thomas A. Tamblyn, is no more than the work of an ordinary Christian or Sunday School teacher."

On December 19, 1950, the local board classified the registrant as 1-A. On December 26, 1950, the registrant appealed and at the same time filed a letter "From the Church Council", signed by seventeen members of the church, stating in part:

> "We, the undersigned, do further declare that Thomas Alfred Tamblyn has been in training in accord with our particular faith and under the direction of our church teaching as a student of theology, since he graduated from secular school some *four years ago,* of a standard equal to any theological seminary of any denomination: and this with the express purpose in view of engaging in the regular pastoral-evangelism branch of our work to which we introduced him on trial about a year ago and to which we appointed him, in accord with the regular practice of our church, last September (with a regular income for full-time work separated entirely from any secular employment) as acceptable to us in that capacity of pastor-evangelist. In such occupation and capacity he is, to our church, unquestionably a 'regular minister' of the gospel."

In January, 1951, the registrant requested a personal appearance before the board with "at least two official representatives of my church." The board replied: "You may appear before this Board Tuesday, January 17, 1951

at 2:00 o'clock, but representatives of your Church are not permitted to appear. However, representatives of your Church may file affidavits sworn to before someone authorized to administer oaths in regard to your change of classification." Registrant then declined to appear or to file any affidavits. On January 30, 1951, there was filed with the board a statement as follows:

> "I was talking to Thomas Tamblyn (sic) concerning his being drafted. I asked him when he was leaving. He said he would not be going. I asked why? He said he was preaching. I asked him when was his next sermon, that I wanted to hear him. He said he was studying under his father who is pastor of the Lakeside Church, but when he began preaching I could hear his first sermon.
>
> "Sincerely,
>
> "/signed/ Andrew Kirby, Jr."

In March, 1951, the registrant was ordered to report for physical examination and was found acceptable for induction into the Armed Services. His record was forwarded to the Appeal Board which reviewed his file and determined on May 9, 1951, that he should not be classified as exempt. The applicant had also claimed exemption as a conscientious objector, though that claim was not insisted on in the District Court nor in this Court. Pursuant to the requirements of the statute as to conscientious objectors, United States Code, Title 50, Appendix, Section 456(j) (see *United States v. Nugent,* 346 U.S. 1), the Appeal Board referred such claim to the Department of Justice for inquiry and hearing. Judge Hugh A. Locke, the Hearing Officer, reported in part:

> "The gist of this entire examination was that the registrant insisted that when an occasion for resistance to force arose, he would not prophesy or say what he would do, but that he would do what he thought was right. Whether this was bad or not would be determined by him, in keeping with his conscience at that time."

The Department of Justice on June 9, 1952, recommended "that the registrant be not classified as a conscientious objector". On July 31, 1952, the Appeal Board unanimously classified the registrant as 1-A. On August 7, 1952, he was ordered to report for induction on September 4, 1952, but on August 15, 1952, his induction was postponed by the State Director, and the file was then forwarded to the National Selective Service Appeal Board in Washington for final decision. That Board on September 22, 1952, by unanimous vote determined the registrant's proper classification to be Class 1-A. On October 7, 1952, he was ordered to report for induction on October 22, 1952. On October 20, 1952, his attorney wrote the Local Board a letter still insisting on the registrant's claim of exemption as a minister of religion, and on the same day the registrant informed the clerk of the board that he would not report for induction. He did not report. His indictment and conviction followed.

The defendant also claimed in the District Court that the Board's order was unlawful because it acted arbitrarily and capriciously. Some cases have held that a factual issue for the jury's determination may arise as to whether the board exceeded its jurisdiction by acting arbitrarily or capriciously. *Imboden v. United States,* 6th Cir., 194 F. 2d 508, 512; *Naznik v. United States,* 6th Cir., 173 F. 2d

328; same case, 184 F. 2d 972; *Goff v. United States,* 4th Cir., 135 F. 2d 610, 612; cf *Estep v. United States,* 327 U.S. 114, 122; *United States v. Nugent,* 346 U.S. 1; *Dickinson v. United States,* 346 U.S. 389, 396; *Roberson v. United States,* 10th Cir., 208 F. 2d 166, 167.

The District Court pursued the safe course and submitted to the jury the question of whether the local board acted capriciously and arbitrarily, and the jury returned a verdict finding the defendant guilty.

The only witness offered for the Government in the District Court was the clerk of the local board, who identified the defendant's selective service file and that was introduced into evidence. The defendant complains that the Court sustained objection to several questions asked this witness by defendant's counsel on cross-examination.

> "Q. Have you ever heard him (Mr. Vann Jones, a member of the Board) discuss Mr. Tamblyn's case?
>
> * * * * *
>
> "Q. Did you ever hear him (Mr. Jones) say words to this effect, maybe not exactly, but to this effect, that he is going to put Mr. Tamblyn in the Army if it is the last thing he did on earth?
>
> * * * * *
>
> "Q. Did you ever hear either one of the members of the Board say that they did not recognize this Lakeside Church as a church in contemplation of this law, Selective Service Law?"

Each of these questions used the word "ever" and, if not otherwise objectionable, was not limited to any time that might be material. There was no attempt to attack the fairness of any of the other members of the Board or of any of the members of either of the Appeal Boards.

The defendant was the only witness who testified in his own behalf. He complains that he was not permitted to introduce witnesses from his church to testify concerning his claimed pastorate and the constitution of the church. We think that, clearly, the defendant had no right to try de novo the issue of his classification by the Selective Service Board. See *Estep v. United States,* 327 U.S. 114; *Dickinson v. United States,* 346 U.S. 389, 396.

The appellant further claims that he was denied the right to an effective administrative appeal and was prejudiced in the minds of the jury, because there was inserted in the registrant's Selective Service File a letter written by Board Member Van D. Jones to Colonel J. T. Johnson, Acting State Director, dated August 19, 1952, reading in part:

> "I have been informed by a sisten-in-law of Thomas A. Tamblyn that it is not Tommie's desire to dodge his responsibility and service in the Armed Forces. In other words, the registrant made the following statement to his sister-in-law 'I would be better off in the Armed Forces and it is not my desire, but my father's and other members' of his Church who are fighting so diligently to have me classified in IV-D.' "

The appellant insists that that letter was not discovered until after the trial and he offers in this Court affidavits of the appellant and of the appellant's only sister-in-law that the statements contained in the letter were false. His excuse for not having offered this evidence on his trial in the District Court is that his attorney was shown the file for only a few minutes and did not have time to properly acquaint himself with its contents. The record shows that, upon the trial, the District Attorney stated, without denial from defendant's counsel, that "Counsel had opportunity to examine the file.", and that the Court further stated, "All right. Mr. Anderton, that file is available to you there. You can use any part of it that you want." No complaint was made at the trial of being allowed insufficient time to examine the file and no request was made for postponement or for the allowance of further time. That complaint cannot be considered for the first time on appeal.

Appellant has made some 38 specifications of error, but we believe that what has been said fairly covers all of his material contentions. We find no reversible error in the record and the judgment is therefore

AFFIRMED.

A True copy:
Teste:

.....
Clerk of the United States Court of
Appeals for the Fifth Circuit.

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

JOHN A. FEEHAN, JR.
CLERK

NEW ORLEANS 6, LA.

October 29, 1954.

Mr. H. L. Anderton
Attorney at Law
Birmingham, Alabama

Mr. Fred S. Weaver
Assistant United States Attorney
Birmingham, Alabama

Mr. Frank M. Johnson, Jr.
United States Attorney
Birmingham, Alabama

Mr. M. L. Gwathmey
Assistant United States Attorney
Birmingham, Alabama

Gentlemen:

I beg to advise you that the Court today handed down its opinion in re:-

No. 14858, Thomas Alfred Tamblyn vs.
United States of America,

whereby the judgment of the District Court is affirmed.

Enclosed is a copy of the opinion.

Very truly yours,

JOHN A. FEEHAN, JR.,
Clerk.

JAF:b
Enc.

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

JOHN A. FEEHAN, JR.
CLERK

NEW ORLEANS 6, LA.

December 4, 1954.

Mr. H. L. Anderton
Attorney at Law
Birmingham, Alabama

Dear Sir:

I beg to advise you that the Court today entered an order denying the Petition for the Rehearing in re:-

No. 14858, Thomas Alfred Tamblyn vs.
United States of America.

No opinion was rendered in connection therewith.

Very truly yours,

JOHN A. FEEHAN, JR.
Clerk.

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

JOHN A. FEEHAN, JR.
CLERK

NEW ORLEANS 6, LA.

December 13, 1954.

Mr. H. L. Anderton
Attorney at Law
Birmingham, Alabama

Dear Sir:

Receipt is acknowledged of yours of December 8th in re:-

No. 14858, Thomas Alfred Tamblyn vs.
United States of America.

I enclose a copy of the printed transcript of the record in this case, to which is attached the proceedings had in this Court, the latter duly certified and the former identified as the record upon which the case was heard and decided by this Court, together with ten additional copies of the printed record and the petition for rehearing. This certified record and the ten copies of the printed record and petition for rehearing should be sent by you to the Clerk of the Supreme Court, together with your petition for certiorari.

I also enclose statement of the cost of certifying the proceedings amounting to $4.00, which I will ask that you please remit.

Please acknowledge receipt.

Very truly yours,
JOHN A. FEEHAN, JR.
Clerk.

JAF:b
Enc.

MOTION FOR STAY OF EXECUTION
IN THE
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
No. 14858
THOMAS ALFRED TAMBLYN,
Appellant

versus

UNITED STATES OF AMERICA

Now comes appellant in the above-styled cause and respectfully prays this Honorable United States Court of Appeals to grant to him a stay of execution in this cause and for grounds sets down and assigns the following:

1. On December 4, 1954, this Honorable Court of Appeals entered an order denying to petitioner a rehearing in said cause. No opinion was rendered in connection with said denial.

2. Appellant most respectfully shows to this Honorable Court that he desires, and prays to be allowed to appeal to the United States Supreme Court from the judgment of this Honorable United States Court of Appeals rendered October 29, 1954, whereby this Honorable Court of Appeals affirmed a judgment or conviction rendered in the United States District Court for the Northern District of Alabama on an indictment filed against defendant on September 4, 1953, which indictment charged that defendant failed to report for induction for training and service in the armed forces of the United States on October 22, 1952, and desires and prays to be allowed to so appeal from the order of this Honorable Court of Appeals rendered on December 4, 1954, denying to petitioner a rehearing in said cause.

3. All of said matters are of record in this Honorable United States Court of Appeals.

Respectfully submitted,

H. L. ANDERTON,
Attorney for Def't.

A copy of this motion for stay was sent to Honorable M. L. Gwaltney, Assistant Federal Attorney on this the 8th day of December, 1954, at his office in the Federal Building in Birmingham, Alabama, by United States mail properly addressed.

H. L. Anderton

H. L. Anderton.

Motion granted on Dec. 10, 1954 by Hon. Richard T. Rives Judge of United States Court of Appeals.

H. L. Anderton

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 506

THOMAS ALFRED TAMBLYN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 216 F. 2d 345.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1954 (Pet. App. 12), and a petition for a rehearing was denied on December 4, 1954 (Pet. App. 13). The petition for a writ of certiorari was filed on January 3, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner, who failed to report for induction in the armed forces and was charged with that offense, was entitled to interpose as a defense the alleged invalidity of his Selective Service classification.

2. Assuming that petitioner was not precluded by failure to exhaust administrative remedies from challenging his classification, whether there was a basis in fact for the administrative denial of his claim to exemption as a minister.

STATUTE INVOLVED

Universal Military Training and Service Act, 62 Stat. 604:

Section 6 (g) [50 U.S.C. App. 456 (g)]:

> Regular or duly ordained ministers of religion, as defined in this title * * * shall be exempt from training and service (but not from registration) under this title.

Section 16 (g) [50 U.S.C. App. 466 (g)]:

> (1) The term "duly ordained minister of religion" means a person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and

ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.

(2) The term "regular minister of religion" means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

(3) The term "regular or duly ordained minister of religion" does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization.

STATEMENT

On November 18, 1953, petitioner was convicted, in the United States District Court for the Northern District of Alabama, of refusing to report for

induction into the armed forces (R. 5-6, 1-3). He was sentenced to two years' imprisonment (R. 61, 68).

The facts may be summarized as follows:

On November 1, 1949, petitioner, then being 18 years of age, registered, pursuant to the Selective Service Act of 1948, with his local board, at Bessemer, Alabama (R. 12). At the time of his registration, petitioner stated that he was a self-employed musician, engaged chiefly in teaching music and tuning instruments (SS 1).[1] On December 4, 1950, he claimed exemption in his classification questionnaire, stating that he had completed six years of elementary school, two years of junior high school and one year of high school, and had been a "theological student under church direction since I graduated from junior high school." He further claimed that he was then working as "Pastor-Evangelist—Directing Vesper Service and Youth Department," and "(On trial as theological student from August, 1949)" (SS 131-136). On December 14, 1950, petitioner, in support of his claim for exemption, sent the local board a letter in which he stated that "Mrs. D. K. Price, who happens to be a sister-in-law to Mr. Van Jones (who I believe is on the Board)" was willing to testify on his behalf "that I have been training for this Gospel

[1] The Selective Service file which was introduced in evidence at the conclusion of petitioner's testimony (R. 51) has been lodged with the Clerk of this Court. It is designated as SS. The page references are to pages marked in pencil in the right corner of the documents therein.

Ministry since I left common school" (SS 125). A subsequent communication from the local board to the State Appeal Board states (SS 97):

> On December 19, 1950, Board Member Jones was called by Mrs. D. K. Price by telephone and was informed that Thomas A. Tamblyn was not a pastor of Lakeside Church, but had been called to preach or pastor said church. She further stated that Thomas' religious activities at that time (and is true today) was teaching of a youth Sunday School Class on Sunday afternoons. The Board would like to point out at this point that this work now being done by Thomas A. Tamblyn, is no more than the work of an ordinary Christian or Sunday School teacher.

On December 19, 1950, the local board classified petitioner 1-A, *i.e.*, available for military service (SS 138; R. 12). On December 26, 1950, petitioner asked for an appeal and filed a letter signed by fourteen members of his "Church Council" (SS 129-130, 138; R. 45-47, 48), declaring that the signers thereof were "a representative body of the acts and authority of the congregation of Christian believers known locally as Lakeside Church, non-denominational" (R. 45; SS 130), and stating:

> We, the undersigned, do further declare that Thomas Alfred Tamblyn has been in training in accord with our particular faith and under the direction of our church teaching as a stu-

> dent of theology since he graduated from secular schools some four years ago of a standard equal to any theological seminary of any denomination, and this with the express purpose in view of engaging in the regular pastoral evangelism branch of our work to which we introduced him on trial about a year ago, and to which we appointed him in accord with the regular practice of our church last September (with a regular income for full-time work separated entirely from any secular employment) as acceptable to us in this capacity of pastor-evangelist. In such occupation and capacity he is, to our church, unquestionably a "regular minister of the gospel". [R. 46-47; SS 130.]

On January 12, 1951, petitioner sent the local board a letter in which he requested a personal appearance before it "for the purpose of considering my ministerial standing and reclassification in accordance therewith", and that he be allowed to have "at least two official representatives" of his church accompany him at the time of his appearance (SS 117, 138; R. 44, 15-16). The local board agreed to grant him the privilege of a personal appearance, but it refused such appearance to his church representatives. At the same time, it informed petitioner that it would receive affidavits in conjunction with his request for change of classification (SS 116, 138; R. 44, 17). Thereafter, petitioner canceled his request for personal appearance (SS 115, 138; R. 15).

Petitioner's file was forwarded to the appeal board in March, 1951 (SS 138). In addition to the above material, it contained a signed statement by one Andrew Kirby, Jr., dated January 30, 1951, declaring that he had talked with petitioner about being drafted; that petitioner said he was not going because he was preaching; and that, in reply to an inquiry when his next sermon would be, petitioner "said he was studying under his father who is pastor of the Lakeside Church, but when he began preaching I could hear his first sermon" (SS 111).

On May 9, 1951, the appeal board determined that petitioner's claim to ministerial exemption should be denied. It referred his papers, insofar as they might be deemed to raise a claim to classification as a conscientious objector, to the Department of Justice for hearing. After a recommendation by the Department against such classification, the appeal board, in July, 1952, unanimously classified petitioner in 1-A (SS 59-62, 138).[2] An appeal to the National Board also resulted in a 1-A classification in September, 1952 (SS 140). Petitioner, having previously been found acceptable, was ordered to report for induction on October 22, 1952 (SS 149-150, 140). He did not report, and his attorney wrote that he would not do so (SS 140, 17-19).

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[2] In the subsequent criminal proceedings arising out of petitioner's failure to report for induction, petitioner made no claim that he was entitled to classification as a conscientious objector. He asserts only that he was improperly denied a ministerial exemption.

Petitioner testified in his own behalf (R. 23-40). He admitted his refusal to report for induction (R. 29, 34). He testified that from 1948 until his resignation on August 2, 1953, he was a "Minister of Religion" and acting as a pastor of the Lakeside Church, which he claimed to have been for fifteen years "a regular constituted religious body," with a current membership of about one hundred persons (R. 23-24, 25, 32, 39). He testified that he devoted full time to church work, and that his father, who was "more experienced," was also a minister in the same church (R. 27, 28, 31-32, 34, 35, 38-40). He also relied on evidence from his Selective Service file, particularly the letter of December 20, 1950, from the members of the church "council" (R. 45).

Prior to petitioner's offer of evidence from his Selective Service file, the trial court stated (R. 43): "Let the record show that the Court has been through this Selective Service file and has read the material portions, and considered them." The trial court also advised petitioner's counsel "that you have a right, if you want to, to go over any portions of that file and offer them in support of your contentions that the classification was arbitrary and capricious or was not in accordance with the Regulations." (R. 43, 48-49.) At the conclusion of petitioner's evidence, the Government introduced into evidence petitioner's entire Selective Service file (R. 51).

The trial court charged the jury that it was not its duty to retry petitioner's classification, but to

determine whether or not the local board acted capriciously and arbitrarily in making the classification (R. 55). After defining the terms "arbitrary" and "capricious", the trial court further charged the jury as follows (R. 56-57):

> The Court has examined the file in this case, and charges you that the burden of proof to show that it was incorrect is upon the Defendant in this case. Now, I am not talking about the burden of proof of his guilt, but the burden of proof to show that this is incorrect, that it is capricious or arbitrary or illegal; that burden is upon the Defendant in this case.
>
> Of course the burden with respect to the Government's duty to satisfy you beyond a reasonable doubt, that never changes until you are satisfied beyond a reasonable doubt from the evidence that the Defendant is guilty, if you are so satisfied.
>
> * * * * *
>
> When the Government shows that this man was classified I-A and he was given notice to report and he did not report, then the Government has made out a prima facie case and the burden is on the Defendant to go forward and show that his reason for not reporting was that the Board acted capriciously and arbitrarily and illegally.[3]

[3] At petitioner's request, the trial court also read to the jury the statutory definitions of "regular" and "duly ordained" minister of religion (R. 58, 59).

In its opinion unanimously affirming the judgment of conviction, the court of appeals referred to the trial court's statement that it had examined and considered petitioner's Selective Service file, and declared: "While that Court did not expressly state that it found in the file a basis in fact for the board's classification, we have carefully re-examined the file here and are left in no doubt that there was such basis" (Pet. App. 4).

ARGUMENT

1. In permitting petitioner to challenge the validity of his classification, the courts below gave him more than his due. Petitioner admittedly refused to report at the induction station. This failure "to report for the last step in the selective process" precluded him from contesting the validity of the underlying classification in defense of the ensuing charge that he failed to report. *Falbo* v. *United States,* 320 U.S. 549, 554. See, also, *Estep* v. *United States,* 327 U.S. 114, 123; *Gibson* v. *United States,* 329 U.S. 338, 343-350. The statement of the court below (Pet. App. 2) that this Court's decision in *Gibson* relaxed the requirement of the *Falbo* case as to exhaustion of administrative remedies is erroneous. The court apparently confused an order to report for induction into the army with an order to report to a civilian camp for work of national importance. In *Gibson,* the Government had conceded that the order to report for work at a civilian camp was the last step in the administrative process, because under the regulations then applicable there was no possibility of

the registrant's rejection after his arrival at camp. It was on that basis that this Court concluded that the registrant had not failed "to complete the administrative process" and that he was not "foreclosed by the *Falbo* decision" (329 U.S. at 350). However, in the instant case, when petitioner was ordered to report for induction into the army, there remained the distinct possibility, under applicable regulations, that he would be rejected at the induction station. See 32 C.F.R. (1951 ed.) 1632.14(b)(6), 1632.15(e); see also 32 C.F.R. (1951 ed.) 73.1.[4] Thus, the *Falbo* rule plainly controls.

2. In any event, as held below, it is clear from the evidence in the Selective Service file that there was a basis in fact for denial of petitioner's claim to exemption as a minister. Considered as a whole, that file amply justifies the conclusion that petitioner was endeavoring to take advantage of his father's position as minister of the church to establish his own claim to exemption. There were manifest inconsistencies between his claim that he was a minister and his statements that he was a student under his father. It appears, moreover, that when petitioner made his claim to deferment as a ministerial student in December, 1950, he was merely doing the work of an ordinary Sunday school teacher. In view of petitioner's own description of his duties as "Directing Vesper Service and

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[4] During the period, October 1948-June 1954, 5.2 per cent of all registrants ordered inducted were rejected at the induction stations. The figure for the state of Alabama was 7.4 per cent during the same period. *Annual Report of the Director of Selective Service, 1954*, pp. 33, 82.

Youth Department" and in view of the information obtained by the Board as to the nature of petitioner's duties, the Selective Service authorities were certainly not required to credit the conclusion of some members of petitioner's sect that he was a minister of the gospel. Petitioner failed to carry his burden of proving that he was a "minister" within the statutory definition, and there were objective facts in the record which showed the invalidity of his claim. Cf. *Dickinson* v. *United States,* 346 U.S. 389.[5]

Submission to the jury of the issue whether the Selective Service boards acted arbitrarily or capriciously—an issue which was properly one for the court alone, *Cox* v. *United States,* 332 U.S. 442, 452—did not prejudice petitioner.[6] The trial judge

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[5] Petitioner also alleges (Pet. 3-4) that the court of appeals erred in refusing to consider letters first submitted to that court, contradicting a statement in petitioner's Selective Service file made in a letter written by a local board member to the Acting State Director in August, 1952, *i.e.,* after the appeal board had unanimously classified petitioner in 1-A. Since there was no discussion of the board member's letter at the trial, it is highly improbable that the jury saw it. And it obviously could have had no significant bearing on petitioner's classification since it was not written until after the classification by the appeal board. Furthermore, as the court below pointed out (Pet. App. 11), petitioner's claim that he did not discover the board member's statement in the file until after the trial furnishes no adequate basis for the belated effort to contradict it at the court of appeals' level, since he had full opportunity at the trial to examine the file.

[6] Petitioner indicated at the trial that he would show that the local board acted arbitrarily in denying him a hearing, but he failed to pursue this course. If he had done so, there might have been a question of fact for the jury as to whether the local board had complied with the regulations. *Niznik* v.

"read" and "considered" the material portions of the file before permitting testimony by petitioner addressed to that issue. This was tantamount to a determination by the judge that the conclusion reached administratively was not unsupportable, but was, on the contrary, *prima facie* valid. Moreover, the court of appeals examined the file independently and concluded that there was sound basis for the administrative determination. The fact that the jury also considered this issue gave petitioner an advantage. He cannot complain that the jury likewise determined that the Selective Service classification had a foundation in fact.[7]

United States, 173 F. 2d 328, 334-335 (C.A. 6), certiorari denied, 337 U.S. 925; *Neal* v. *United States*, 203 F. 2d 111 (C.A. 5), certiorari denied, 345 U.S. 996; cf. *Gibson* v. *United* States, 329 U.S. 338, 351, fn. 22.

[7] Since the issue was the validity of the classification by the boards on the evidence before them, the trial court properly refused to permit petitioner to adduce evidence which he claimed would prove that the classification given him by the local board was erroneous (R. 7, 8, 9). Similarly, the trial court properly refused (R. 41) to permit members of his church to testify as to his alleged ministry.

CONCLUSION

Petitioner was not entitled, in the first instance, to raise a question as to the validity of his classification. In any event, the evidence fully warrants the conclusion, reached below, that the classification had a basis in fact. The decision below is correct and no question warranting review by this Court is presented. The petition for a writ of certiorari should accordingly be denied.

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FEBRUARY, 1955.

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IN THE

Supreme Court of the United States

No. 506

THOMAS ALFRED TAMBLYN,

Appellant

Versus

UNITED STATES OF AMERICA,

Appellee

PETITION FOR REHEARING

By

H. L. ANDERTON,

Attorney for Appellant

THOMAS ALFRED TAMBLYN,

Appellant

Versus

UNITED STATES OF AMERICA,

Appellee

PETITION FOR REHEARING

Now comes petitioner, Thomas Alfred Tamblyn, and moves the Honorable Supreme Court of the United States to set aside the Court's denial of his petition for writ of certiorari rendered on February 28, 1955, and to grant to him a rehearing of said writ, and for grounds of said petition sets down and assigns the following:

1. Reference is respectfully made to Government File 1, which is the Local Board's accumulated file, and which attorney for government introduced at the original hearing in Federal Court. This file neither attorney for defendant nor defendant had opportunity to properly examine at or before the original trial and said file is now in the United States Supreme Court. No copies exist.

The report of the hearing officer, Hugh Locke, is in said file. The hearing officer states that his report was written and was to the effect that "Tamblyn was not a "minister of religion" in the Lakeside Church. That preliminary decree or judgment of the hearing officer went to the jury and necessarily influenced them in their adverse decision, and was highly prejudicial to the vital interests of the defendant and was contrary to law.

2. The Board's file, Exhibit 1, contains a letter written by Van Jones, Board member, to Col. Johnson on appeal dated August 19, 1952, discovered after the trial, which made a vicious attack upon defendant, his father, his at-

torney and others and was greatly prejudicial to defendant, and essentially untrue. Jones said in the letter he had conferred with Bivona, another member and directed the letter go to Presidential Appeal Board. That vicious and untrue attack was enough to condemn defendant without any hearing as it was intended. Attached hereto are two original affidavits, two printed affidavits and the photostatic copy of the Jones to Johnson letter which together show the arbitrary, capricious and unjust nature and humor of the Local Board. (Being chiefly the originals only one copy could be attached and are marked Exhibits x y, z, 1 and 2).

3. The only indictment or charge that was placed against petitioner before he was tried and the one upon which he was tried and placed in jail was in essential part as follows:

> "and being required by law, according to written notice received by the defendant from said Local Board No. 70 to appear and be inducted for military training and service, on to-wit, the 22nd day of October, 1952, and being charged with the duty of appearing and submitting to induction for training and service in the armed forces of the United States on the day and date so required, did then and there wilfully, unlawfully, and contrary to the said duty fail, neglect, and refuse to appear and submit to induction for training and service in the armed forces of the United States".

Thus the only charge against petitioner was that on October 22, 1952, he wilfully, unlawfully and contrary to his duty failed, neglected and refused to submit to induction for training and service in the armed forces of the United States. It is common law and sacred justice in America that one must be charged with the crime upon which he is to be tried and given a chance to prepare and defend himself upon that charge before he can be convicted and incarcerated.

The alleged crime upon which petitioner was tried and convicted and placed in jail was, according to the sole indictment against him, committed on October 22, 1952, for not on that date submitting to induction by reporting at the camp. Yet he was not legally required to so report at camp for induction on the authority of Gibson vs. United States, 329 U. S. 337-362, which holds that "one need not report at camp in order to exhaust the administrative process so as to be entitled to question the Draft Board's denial of his claimed exemption from military service in a criminal proceeding". Petitioner was not guilty on October 22, 1952, of violating the Selective Service Act as Amended by not on that day reporting to camp for induction. No other charge was made against him.

Respectfully petitioner says he was deprived of his liberty without due process of law in violation of the Fifth Amendment to the Federal Constitution.

4. As further ground for his petition for rehearing petitioner respectfully shows to this Honorable Supreme Court that said indictment contained no other information as to the nature and cause of the accusation than that he failed to submit himself for induction on October 22, 1952, and was tried and convicted and jailed upon matters of evidence entirely extraneous to the charge set out in the said indictment.

Respectfully petitioner says that the charge in the indictment that he failed to report for induction on October 22, 1952, did not inform him of the matters and things produced in evidence on which evidence he was convicted and jailed.

The Sixth Amendment to the Federal Constitution requires that the accused in all criminal prosecutions shall "be informed of the nature and cause of the accusation" and

the conviction under said indictment was in violation of said Sixth Amendment.

5. The Lakeside Church, in which petitioner avers he was duly elected and serving as minister of religion when the charges herein were raised, was and is democratic in its organization and government and completely controlled by its membership. As shown by the Governments File, Exhibit 1, and by the evidence, Rev. Thomas Alfred Tamblyn, petitioner herein, was called and was serving as Regular Minister of Religion, and was "recognized by such church, sect, or organization as a regular minister". (Section 16, (G), (2). As such he was "exempt from training and service (but not from registration) under this title". (Section 6, (g)).

Every church member in the church recognized Rev. Tamblyn as the church's minister of religion. Under the democratic form of its church government no one else had any right to dislodge him as minister of religion—that was a matter between the church and its God—it is not even the policy of our government under the constitution and under the time-honored principle of separation of church and state—to step in and deny to the congregation its right under God to obtain its own minister and to operate its own religious affairs.

Respectfully petitioner says it is a violation of the most sacred Amendment to the American Constitution for Congress or for any Court thereunder to make any law respecting the establishment of any form of religion or to prohibit the free exercise of religion in any such church in America. The Selective Service Act was not conceived to do that. And if the Act is administered to control the God-given autonomy of small or large churches the religious influence that has made America great from Colonial days

to the present such change will disappoint and dampen the arder of the millions who now gladly and without pay spend their time and talents through their beloved churches assisting their ministers in lifting American citizenship morally and building hope in the human heart for better things beyond.

Respectfully we say the churches of America have done more to make and preserve the Nation than have guns and ships of war and that the Constitutional security that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" must never lessen if liberty and protection are to live.

PREMISES CONSIDERED, Petitioner and his attorney pray the Court for a rehearing of this cause, and on account of its vital importance that oral argument be allowed before the decision of the Court is rendered.

.....

Attorney for Petitioner.

I, H. L. Anderton, Attorney for Appellant, do hereby certify that the petition for rehearing in the above-styled cause is filed in good faith and is not filed for the purpose of delay or with any other ulterior reason or motive and is attempted to be restricted to the grounds in Rule for rehearings.

.....

H. L. ANDERTON

This is to certify that a copy of the above petition for rehearing was served upon the Honorable M. L. Gwaltney, Assistant Federal Attorney, on the .. day of March, 1955, personally by delivery at the office of the said Attorney for Appellee the United States of America.

.....

H. L. ANDERTON